Supreme Court, U.S.
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No. 95-119

In The Supreme Court of the United States

October Term, 1995

CMK CONSTRUCTION COMPANY, ET AL.,
Petitioners,

v.

CARPENTERS' PENSION TRUST FUND – DETROIT AND VICINITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

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II.

DID THE NATIONAL LABOR RELATIONS BOARD ISSUE A PRIOR DECISION IN THIS MATTER TO WHICH THE COURTS BELOW SHOULD HAVE DEFERRED?

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Respondents, Carpenters' Pension Trust Fund–Detroit and Vicinity, et al.[1] respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit's opinion below. That Opinion, which is unpublished, is reprinted beginning at Page 12 of the Appendix to the petition.

OPINIONS BELOW

Respondents disagree with the Petitioners' inclusion of the following in the "Opinions Delivered" section of their petition:

> National Labor Relations Board Order withdrawing Complaint, Dismissing Charge, and Withdrawing Notice of Hearing, dated June 18, 1991.

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1 **The full list of Petitioners and Respondents is included in the "List of Parties" section of the petition for certiorari.**

National Labor Relations Board Dismissal of Charge, dated September 10, 1991.

These documents are not official or unofficial reports of opinions delivered in this case by other courts or administrative agencies, as required by Rule 14.1(d) for inclusion in the petition. Instead, they are mere administrative dismissals by the Regional Director of the Seventh Region of the National Labor Relations Board of unfair labor practice charges brought in proceedings unrelated to the instant case by Charging Parties other than the Respondents herein.

STATUTES INVOLVED

In addition to the statutory provision cited by Respondent to this court, 29 U.S.C. Section 185, Respondents also call the Court's attention to the following statutory provisions upon which the Respondents also relied in bringing this action — Sections 502(a)(3)[2] and 515[3] of the Employee Retirement Income Security Act (ERISA), 29 USC § 1132(a)(3) and 1145.

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[2] **ERISA Section 502(a)(3) provides that a civil action may be brought:**

> **by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. 29 USC § 1132(a)(3).**

[3] **ERISA Section 515 provides that:**

> **Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement. 29 USC § 1145.**

STATEMENT OF THE CASE

A. An International Agreement Is Negotiated Between Local Union 1234 And The Michigan Carpentry Contractors Association Effective July 10, 1989 Through July 10, 1992.

The Petitioners are members of the Michigan Carpentry Contractors Association (hereinafter MCCA) and have delegated to that Association the power to negotiate collective bargaining agreements on their behalf with the United Brotherhood of Carpenters and Joiners of America (UBCJA). (Pl. Ex. 2)[4] In the past, the MCCA and several other Employer Associations had negotiated agreements with the Carpenters District Council of Detroit (CDC) (Pl. Ex. 13), covering residential construction work performed within the twelve county geographic jurisdiction of the CDC. The last of these agreements expired August 1, 1989. (Pl. Ex. 13 "Settlement–August 1, 1988").

On May 16, 1989, the President of the UBCJA created Local Union 1234 and gave it the power to negotiate agreements covering residential carpentry work within eleven of the twelve counties covered by the CDC, with the only exclusion being Genesee County. Local Union 1234 was not affiliated with the CDC. As a result of the General President's action, the CDC lost the power to negotiate agreements covering residential carpentry work except in Genesee County. (William Fair at TR. 42-44).

On July 10, 1989, the MCCA and the UBCJA entered into a three year agreement (hereinafter referred to as the "International Agreement"). (Pl. Ex. 1). It is this agreement upon which this suit is based. The agree-

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[4] References to Trial Transcripts are stated as Tr.___; Trial Exhibits are referred to as Pl. Ex.___ or Def. Ex.___.

ment was negotiated by the Executive Director of the MCCA, James "Don" Doughty. (James Doughty at TR. 114, 116, 144). Under Paragraph 2 of the International Agreement, the MCCA agreed to ". . . comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of the UBCJA." Paragraph 3 of the agreement between the MCCA and the UBCJA provided:

> Payment of pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreement for that locality * * *

This agreement was the first such agreement with an international union signed by the MCCA. (James Doughty at TR. 152).

Prior to the International Agreement being signed, on April 26, 1989 and June 12, 1989, Mr. Doughty wrote the First General Vice President of the UBCJA, Dean Sooter, with questions he had concerning the signing of the International Agreement. In his June 12th correspondence, Mr. Doughty expressed his view to Mr. Sooter that in signing the International Agreement . . . "we are only signing for those members doing Commercial Work under the jurisdiction of the Carpenters District Council and Residential Work in Genesee County." (Pl. Ex. 14).

On June 20, 1989, Mr. Sooter replied to Mr. Doughty (Pl. Ex. 15) and informed him that there appeared to be some misunderstanding of Mr. Sooter's earlier May 5, 1989 letter to Mr. Doughty since in that letter he had explained that " * * * the International Agreement would apply to *any* work within the UBC's jurisdiction, wherever it was performed (emphasis added) and that the International Agreement would require the application of whatever local wages and conditions were in

effect in each area where work was performed. Mr. Sooter added that on work performed within the Detroit Metropolitan area he had explained in his earlier letter that:

> * * * under the International Agreement, on *commercial* work the employer would apply the Detroit District Council conditions. For *residential* work under the International Agreement, the employer would apply the Detroit District Council conditions in Genesee County only, and the Local 1234 conditions for all other counties covered by Local 1234.

He cautioned Mr. Doughty that this explanation was not meant to imply that the International Agreement covered only Detroit area commercial and residential work:

> On the contrary, the International Agreement would be binding on each signatory employer all over the State of Michigan, and throughout the U.S. and Canada, where he may perform UBC work. In each locality where work is performed, the employer would look to the appropriate local agreement to determine what wages, etc. apply, but he would not actually need to sign locally in each area unless he wished to do so.

Mr. Sooter concluded that if this understanding was not acceptable to Mr. Doughty, that Mr. Doughty should let him know " * * * and we will return your documents unsigned." The MCCA and the UBCJA signed the International Agreement, without any limitation as to geographic scope or type of work, *after* this exchange of letters. No representative of the CDC participated in these negotiations. (William Fair at TR. 76, 77).

B. Local Union 1234 And The MCCA Also Negotiate A Residential Agreement Effective August 1, 1989 Through August 1, 1990. Later The CDC Becomes Responsible For This Agreement's Enforcement And For The Negotiation Of A Successor Agreement.

After the International Agreement was signed, Local Union 1234, the MCCA, and other Employer Associations signed a separate agreement covering residential carpentry work to be performed in the eleven county area (which did not include Genesee County), effective August 1, 1989 through August 1, 1990. (Pl. Ex. 10).

In November of 1989, the General President of the UBCJA returned jurisdiction over the residential carpentry field to the CDC in its entire 12-county area. Local 1234 affiliated with the CDC, and the CDC became responsible for the enforcement of residential agreements, including the agreement between the MCCA and Local 1234, and for the negotiation of new agreements. (William Fair at TR. 47-48).

For approximately 60 days prior to the August 1, 1990 expiration of the agreement initially negotiated between Local 1234 and the MCCA, the CDC and the MCCA attempted to negotiate a new agreement. These contract negotiations did not result in a new agreement and the CDC struck in support of its contract demands, following a contract extension, on August 15, 1990.

C. The CDC Files Unfair Labor Practice Charges With The National Labor Relations Board Because Of The MCCA's Failure To Continue To Make Fringe Benefit Contributions Following The August, 1990 Expiration Of The Contract.

Prior to August 15, 1990, all of the Petitioners had made fringe benefit fund contributions to the Respondent Funds for both residential and commercial carpentry work. Subsequent to August 15th, all of the Petitioners, and other members of the MCCA, continued

to make contributions to the funds on behalf of their employees for commercial carpentry work performed by them.[5] However, the Petitioners ceased making contributions for residential carpentry work (except for a brief period in February, 1991). (William Fair at TR. 55-57).

On August 20, 1990, the CDC filed an unfair labor practice charge with the National Labor Relations Board (Def. Ex. 18) against the MCCA. Specifically the CDC alleged in the charge that the MCCA had violated Section 8(a)(5) of the National Labor Relations Act, 29 USC, § 158(a)(5), when, following the contract's August termination, it unilaterally changed wages, hours, and working conditions. After initially issuing Complaint, the Regional Director for the NLRB ultimately dismissed the charge based upon the NLRB's prior decision in *John Deklewa and Sons, Inc.*, 282 NLRB 1375 (1987). That dismissal was sustained on appeal by the General Counsel for the NLRB.

D. The CDC Learns Of The Existence Of The International Agreement And The Strike Is Terminated.

Initially, the CDC struck both MCCA commercial and residential construction projects. The MCCA, through Mr. Doughty, complained to the President of the International Union, notifying him on August 22, 1990 that the MCCA was not negotiating a commercial agreement in the Detroit area and that its members were paying the negotiated wages and fringe benefits on commercial projects. (Def. Ex. 25). In his reply to Mr. Doughty also sent on August 22, 1990, the General President stated:

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5 Mr. Doughty acknowledged that the MCCA had not signed a local agreement covering commercial carpentry work, and as a result, that the MCCA's members were contributing for commercial work under the International Agreement. (James Doughty at TR. 145). Contractors are not required to sign local agreements in order to contribute to fringe benefit funds under International Agreements. (William Fair at TR. 72).

> It is the established policy of this union that employers signatory to an international agreement are not subject to work stoppages resulting from local negotiations, provided that such employers do not participate directly in the local negotiations and agree to abide by any settlement reached in such negotiations.
>
> (Def. Ex. 24).

Since the MCCA was participating in negotiations with the CDC only for a local residential, and not a commercial, agreement, and was continuing to comply with the negotiated wages and benefits under the local commercial agreement, the General President concluded that any work stoppage by the CDC against MCCA member contractors could only affect residential projects. Thus, he directed the CDC to cease any strike activity against members of the MCCA on any projects performed in accordance with the terms and conditions of the local commercial agreement. (Def. Ex. 24).

The CDC first became aware of the existence of the International Agreement as a result of the August 22, 1990 letter from the General President of the UBCJA to the MCCA (William Fair at TR. 50-51). After learning of this agreement, the CDC, through its then Secretary-Treasurer/Business Manager Daniel Kelley, wrote Mr. Doughty to inform him that it was the Union's position that under this agreement, the members of the MCCA, notwithstanding the expiration of the agreement between Local 1234 and the MCCA, were required to contribute to the plaintiff funds at the rates established in the area through contracts between the CDC and other employers performing such work. It notified the MCCA of the rates that it expected the MCCA's members to pay[6] and that it was notifying its own members to end their strike and return to work. (Pl. Ex. 26).

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[6] During the period August 1, 1990 through February 1, 1992, the CDC and a number of other Employer Associations and Em-

(*concluded on page 9*)

On December 9, 1991, the General President of the UBCJA returned to Local 1234 the exclusive jurisdiction over the residential carpentry work in the eleven counties that it had previously covered. Effective February 1, 1992, the MCCA and Local 1234 entered into a new collective bargaining agreement. (Def. Ex. 22). Following this agreement, the members of the MCCA, including all of the Petitioners, resumed contributions to the funds.

E. The Respondent Fringe Benefit Funds File Suit Under The International Agreement To Collect Delinquent Fringe Benefit Fund Contributions. The District Court Rules In Their Favor.

In their First Amended Complaint (R. Ex. 8), the Respondent Funds claimed that the Petitioner Employers owed delinquent fringe benefit contributions, including contractual late payment charges or liquidated damages, on behalf of certain of their employees from work performed by them from August, 1990 through February 1, 1992 under the terms of the International Agreement.

A non-jury trial was held before the Honorable Horace Gilmore on May 19 and 20, 1992. On May 21, 1992, Judge Gilmore issued his Opinion[7] from the bench. In it, after first rejecting the defendants' claim that the NLRB preempted this action, (Opinion of Court at 2), he agreed

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(*continued from page 8*)

ployers negotiated collective bargaining agreements covering residential carpentry work. (William Fair at TR. 73-74). These agreements established a uniform schedule of fringe benefit contribution rates. (William Fair at TR. 73-75, 103). It was these rates that Mr. Kelly included in his letter. Mr. Doughty, a trustee of the plaintiff funds, acknowledged that non-MCCA member contractors contributed to the funds for residential work performed by their employees during this time period and that some of these contractors performed the same type of residential work as members of the MCCA. (James Doughty at TR. 151).

7 The Opinion is reported at pages 876 through 885 of the Trial Transcript, which is attached to the Petitioners' Lodgings.

with the plaintiff funds and found that the defendants were liable for fringe benefit contributions for residential carpenters for the period of August, 1990 through February 1, 1992. He based this conclusion on those provisions of the International Agreement:

(1) which required the MCCA to "comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of UBCJA" (Pl. Ex. 1, Paragraph 2); and

(2) which provided: "Payment of pension and/or health and welfare contributions for an employee's work in each locality shall be made to such funds and in such amounts as are identified in the applicable collective bargaining agreement for that locality." (Pl. Ex. 1, Paragraph 3; *Id.* at 5-6, 8-9). He found that there were several local agreements between the CDC and other contractors or associations in effect during the period of August 1, 1990 to February 1, 1992, which established the rates of fringe benefit contributions for the area and that these agreements collectively, since they contained uniform rates, were the "applicable collective bargaining agreement" referred to in the International Agreement. (*Id.* at 5-6).

He rejected the defendants' argument based upon the fact that they were not party to a local agreement after August 1, 1990, noting that contractors operating under International Agreements with the UBCJA are only required to comply with, and not to sign, agreements with the local unions or district councils in the geographic area in which they are working. (*Id.* at 6-7). The fact that the MCCA lacked a local agreement which they themselves had negotiated did not matter, with the

Court noting that since the defendants recognized that the International Agreement would require them to pay contributions at the rate established in local agreements when working outside of the eleven-county area, there was no basis for their belief that the International Agreement would not also bind them in a like manner within that area. (*Id.* at 9). He also concluded that the expiration of the local agreement could affect only the rate of fringe benefit payments, but did not affect the liability to pay into the funds. (*Id.* at 8).

He finally rejected the defendants' argument that the International Agreement was meant only to cover commercial and not residential work, on the basis that there was no language in the International Agreement which so limited coverage and that Dean Sooter's letter of June 20, 1989, the last written correspondence concerning the party's intentions in making the agreement, clarified any possible ambiguity and established the "... parties' intention that the International Agreement applie[d] both to commercial and residential work and that the Defendants would be bound to local wage agreements to which they had not actually signed." (*Id.* at 6, 9-11). He ended:

> In sum, I find that the International Agreement obligated Defendants to pay fringe benefit contributions for the residential carpenters for the period from August, 1990 through February 1, 1992 after the Local 1234 agreement had expired. I will therefore order this amount be paid.
>
> (*Id.* at 11).

The parties, with the Court's approval, agreed to bifurcate the issues of liability and damages. The issue of damages ultimately was referred to a magistrate. On September 7, 1993, Judge Gilmore issued his Final Judgment in favor of the funds. (Petitioners' Appendix at 8-11).

F. The Sixth Circuit Affirms The District Court's Decision.

Defendants filed a timely Notice of Appeal with the United States Court of Appeals for the Sixth Circuit on September 29, 1993. On January 12, 1995, the Sixth Circuit issued its Opinion affirming the decision of the Court below. On February 17, 1995, that Court denied a Petition for Rehearing. (Petitioners' Appendix at 12-19).

In their Petition, petitioners assert that:

> The Sixth Circuit Court of Appeals found that even though there were representational issues involved, the District Court did not err in refusing to consider the prior NLRB representational determination.
>
> (Petition at 10).

This characterization of the Sixth Circuit's Opinion is in error. At no point did the Sixth Circuit state that it believed that there were representational issues involved in the case. Instead, the Court only noted that the appellant employers were arguing that there were representational issues involved in the case and thus, that the NLRB had exclusive jurisdiction of the matter. The Court then agreed with the District Court's findings that this claim had no merit and that the matter was properly in the federal courts.

Instead of viewing the case as a representational one, the Sixth Circuit considered it as one of mere contract interpretation, noting that it reviewed the District Court's interpretation of the contractual provisions *de novo*. After doing so, that Court agreed with the District Court's conclusion that the International Agreement bound the appellant employers to contribute to the Funds on both commercial and residential carpentry work, wherever that work was performed.

SUMMARY OF THE ARGUMENT

The specific issue presented in this case involves the obligations of the members of a multi-employer association to continue to make fringe benefit contributions at the rates established in the area, under the provisions of an agreement unlimited in scope negotiated by their bargaining representative and an International Union, after a local agreement negotiated by that same bargaining representative and an affiliate of that same International Union has expired.

In their attempt to persuade this Court to hear this matter, Petitioners, of course, disagree with this characterization of the issue, since they are aware that mere issues of contract interpretation undoubtedly would not be deemed worthy of this Court's review. Instead, Petitioners argue

(1) that this case involves questions of representation which had to be, and were, first resolved by the NLRB;

(2) that the decision of the Sixth Circuit, which held that the International Agreement applied to both residential and commercial carpentry work, conflicted with this prior decision of the NLRB; and

(3) that review by this Court, thus, is appropriate because the Sixth Circuit's decision either involves important unresolved issues of federal law or conflicts with prior decisions of this Court, and other courts of appeal, which have held that the NLRB has exclusive jurisdiction in representational matters.

The Petitioners are wrong on all counts. This case does not involve representational issues and, even if it did, the courts would have concurrent jurisdiction with the NLRB to decide such issues. Moreover, the NLRB has not issued a decision on the issues presented in this case and there was no conflict between the deci-

sions of the Courts below and any prior determination by the NLRB. Thus, no basis for review by this Court has been established.

REASONS FOR DENYING THE WRIT

I.

THE NATIONAL LABOR RELATIONS BOARD DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THIS DISPUTE WHICH DOES NOT INVOLVE REPRESENTATIONAL ISSUES. INSTEAD, THE FUNDS SUED TO ENFORCE AN EXISTING AGREEMENT BETWEEN THE MCCA AND THE UBCJA.

Petitioners argue that the courts below lacked jurisdiction of this dispute because it allegedly involved a representational issue which was within the exclusive jurisdiction of the National Labor Relations Board (NLRB) and upon which, they contend, the NLRB has already ruled. They base this claim upon the unfair labor practice charge (Def. Ex. 18) filed by the Carpenters District Council of Detroit and Southeastern Michigan (CDC) against the MCCA following the expiration of the August 1, 1989 through August 1, 1990 agreement between Carpenters Local 1234 and the MCCA.[8] Specifically the CDC alleged in the charge that the

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8 **Petitioners also attempt to rely on a separate unfair labor practice charge filed by an individual, Jon Baddor, against one of the members of the MCCA, Harris Homes. That charge was eventually dismissed on the same basis as the earlier charge filed by the CDC,, i.e., because the collective bargaining agreement had expired on August 1, 1990, and that by virtue of Section 8(f) of the NLRA, the Employer was under no obligation to continue fringe benefit contributions.**

This document was rejected by the District Court (Trial Tr. 182-186). There is no evidence that the Petitioner raised the propriety of that rejection as an issue before the Sixth Circuit. This document was not included as part of the Joint Appendix to that Court. (See Appendix Index). Thus, this document is not properly before this Court for its review.

(*concluded on page 15*)

MCCA had violated Section 8(a)(5) of the National Labor Relations Act, 29 USC, § 158(a)(5), when, following the contract's termination, it unilaterally changed wages, hours, and working conditions. The Regional Director for the NLRB ultimately dismissed the charge based upon the NLRB's prior decision in *John Deklewa and Sons, Inc.*, 282 NLRB 1375 (1987).

Deklewa involved a change in the NLRB's interpretation of Section 8(f) of the NLRA, 29 USC § 158(f) which allows employers and unions in the construction industry to enter into labor agreements irrespective of whether a majority of the workers affected by the agreements desire representation. Prior to *Deklewa*, such agreements were terminable at will. After *Deklewa*, such agreements are enforceable through their expiration date; but beyond that point, since the Union does not enjoy a presumption of majority status, the Employer has no continuing duty to bargain and can unilaterally change wages, hours, and working conditions. It was for this reason that the Regional Director, in an action later sustained on appeal, dismissed the charge filed by the CDC against the MCCA's actions following the expiration of the Local 1234 contract. See also *Fox Painting Company* v *NLRB*, 919 F2d 53, 55 (6th Cir., 1990).

From these facts, the Petitioners reach the erroneous conclusion, as seen below, that this matter should have been dismissed because the NLRB has exclusive jurisdiction over representation matters and because the NLRB allegedly has already decided that the International Agreement did not cover residential carpentry work.

(*continued from page 14*)

In any case, even if it had been received, this document would have been entitled to no consideration. Neither the Respondents, nor the CDC, were parties to that proceeding. Moreover, there is no support for Petitioners' argument that the Regional Director based his dismissal of the charge on the International Agreement. Finally, for the reasons, stated infra, his dismissal of the charge was a mere administrative determination, entitled to no res judicata effect.

A. The NLRB's Dismissal Of The Unfair Labor Practice Charge Filed By The Carpenters District Council Of Detroit Is Entitled To No Res Judicata Or Collateral Estoppel Effect.

The initial, but by no means the worst, flaw in the Petitioners' argument is their contention that the NLRB has decided anything. All that has occurred is that the Regional Director, acting for the General Counsel of the National Labor Relations Board, has refused to issue a Complaint based upon the CDC's unfair labor practice charge against the MCCA. This administrative action was not a judicial determination on the merits of the CDC's claim and thus has no res judicata or collateral estoppel effect. *Warehousemen's Local No. 206* v *Continental Can Co.*, 821 F2d 1348, 1351-1352 (9th Cir., 1987) (and cases cited therein). *Thomas* v *Consolidated Coal Co.*, 380 F2d 69, 78 n.12 (4th Cir. 1967), *cert denied* 389 U.S. 1004 (1967). By contrast, in the cases relied upon by Petitioners, the NLRB actually had issued a final decision following a full hearing on the merits.

Moreover, whatever the Regional Director decided, the decision did not concern this particular dispute. The proceedings before the NLRB involved a charge brought by the CDC against the MCCA based upon the MCCA's actions following the August 1, 1990 expiration of the MCCA's agreement with Local 1234. In contrast, the contract that the funds sued to enforce here was a totally separate agreement between the International Union and the MCCA *which had not expired*, but which remained in effect through July 18, 1992. Moreover, contrary to the assertion repeatedly made by Petitioners in their petition, the Regional Director made no determination concerning the validity or continued enforceability of the International Agreement — an issue which could not even have been presented to him since the CDC was not a party to this agreement — only its International Union was.

B. There Are No Representational Issues Present In This Case.

Contrary to the Petitioners' assertion, this dispute does not involve a representational issue, i.e., which of two competing labor organizations should represent the Petitioners' employees, which allegedly should have been deferred to the exclusive competence of the NLRB. Instead, the only issues presented involved the interpretation of the International Agreement.

C. Even If Representational Or Unfair Labor Practice Issues Were Presented In This Case, The Courts And The NLRB Would Have Concurrent Jurisdiction To Decide Them.

In *Smith* v *Evening News Association*, 371 U.S. 195, 197-98 (1962), this Court held that under § 301(a) of the LMRA, 29 USC § 185(a), a dispute which involves an unfair labor practice within the province of the NLRB may nonetheless justify the invocation of federal court jurisdiction where the dispute arises out of a collective bargaining agreement. Thus, under *Smith*, the funds may bring suit here to enforce the International Agreement even though the Petitioners' actions in refusing to comply with its terms might also have been styled as an unfair labor practice by the NLRB.

Moreover, as this Court later held in *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), even if there were representational issues present in this case, the jurisdiction of the Courts would not have been affected. In *Carey*, the petitioner union had filed a grievance asserting that certain employees in the engineering lab at the plant in question, who were represented by another union, should be included within its bargaining unit. The Employer refused to arbitrate, contending that the controversy presented a representation matter for the NLRB. The state courts agreed and refused to order arbitration.

This Court reversed. The Court felt that the case could be styled as either a work assignment, or a representational dispute. If it were a work assignment dispute, it clearly could be resolved under traditional grievance arbitration procedures. If the controversy was a representational one, involving the duty of the Employer to negotiate with the representative of its employees, unfair labor practice charges or a petition for unit clarification could have been filed with the NLRB to resolve the dispute. If in the meantime, the matter had proceeded to grievance arbitration, the NLRB could show deference to the arbitrator's award. If it did not, and if the NLRB disagreed with the arbitrator's determination, by ruling that the employees involved were members of one bargaining unit or another, the NLRB'S ruling would take precedence. *Id.* at 272. However, the mere possibility of conflict was no barrier to resort to a tribunal other than the NLRB. The case should have been allowed to proceed to arbitration.

Thus, contrary to Petitioner's assertion, this Court already has decided in *Smith* and *Carey* the issues allegedly presented below. The Courts would have concurrent jurisdiction with the NLRB to decide this matter, whether or not unfair labor practice issues or representational issues were involved. It would only be if the Courts and NLRB issued conflicting decisions that the issue of whose ruling should take precedence would have to be reached. However, as seen above, that issue need not be reached here since the NLRB has decided nothing.

Finally, even if the NLRB had issued a decision on the charges filed by the CDC against the MCCA, a conflict would not be presented since the issues presented to the NLRB and the Courts below in the instant case were not the same, as seen above.

II.

CONTRARY TO PETITIONERS' ASSERTION, NEITHER THIS COURT, NOR ANY OTHER COURT, HAS EVER DECIDED THAT A NO-STRIKE CLAUSE IS A REQUIREMENT OF A VALID CONTRACT.

In their petition, the Petitioners make the incredible assertion that:

> This Court has long held that the no-strike clause is the quid pro quo for the contract. Without a no-strike clause there can be no contract since there is no quid pro quo. See *Carey* v. *Westinghouse*, 375 U.S. 261 (1964).
>
> Petition at 16.

Petitioners later contend:

> The NLRB acknowledge the understanding of the parties by finding that the International Agreement did not apply to the residential employees. The NLRB determination took into consideration the national labor policy aspects of the relationship between the parties, and recognized that there can be no contract without a no-strike clause.
>
> Petition at 18.

Petitioners then argue that the Decisions below conflict with these alleged principles because the UBCJA's International President had notified the MCCA that the no-strike clause of the International Agreement would not apply while the MCCA and the CDC were in negotiations for a successor local residential agreement. Petitioners contend, based upon the alleged principles espoused above, that without the no-strike clause, the International Agreement was invalid, that the District Court and Sixth Circuit should have so found, and that this Court should grant review of this matter because of their failure to do so.

This argument can be discarded on either of two grounds. First, this argument was not raised by Petitioners below and thus, obviously, was not considered by either the District Court or the Sixth Circuit. Thus, it is not properly before this Court for its consideration. Second, even if the argument had been raised below, it would have been summarily rejected. Clearly, neither this Court, either in *Carey*, or in any other decision, nor any lower court, nor the NLRB has ever held that a contract without a no-strike clause is invalid. Instead, a no-strike clause simply has been regarded as a mandatory subject of bargaining which clearly can be, but does not have to be, included as part of a collective bargaining agreement. Thus, the General President's suspension of the no-strike clause of the International Agreement during local negotiations did not affect the continuing validity of the International Agreement[9] and no basis for this Court's review has been established.

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9 The error in the Petitioners' position has been that they read the position of the General President too broadly, as if he were suspending the operation of the *entire* International Agreement, including the obligation to continue payment of fringe benefit contributions, while local negotiations were ongoing. However, this is clearly not what the MCCA was told. Instead, in the first correspondence between Dean Sooter and Mr. Doughty on May 5, 1989, Mr. Doughty was told that the International Agreement *would* remain in effect during negotiations, with *only* the no-strike clause not being in effect. Thus, despite the fact that it was engaged in negotiations, the Petitioners remained obligated, under Paragraph 2 of the International Agreement to " . . . comply with contractual wages, fringe benefits, hours and other working conditions established between the UBCJA affiliates and the employers or recognized employer agencies in the localities in which the Company does any work within the jurisdiction of the UBCJA."

CONCLUSION AND RELIEF REQUESTED

Based upon the arguments advanced above, and the record as a whole, Respondents respectfully request that this Court deny Petitioners' request for a writ of Certiorari.

Respectfully submitted,

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